90-684

NO.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

CLAWZELLE WIGGINS,
Petitioner,

versus

CHRYSLER CORPORATION,
Respondent,

ACUSTAR, INC.,
Respondent,

UNITED AUTOMOBILE, AEROSPACE, AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), CHRYSLER INTERNATIONAL,
Respondent,

UNITED AUTOMOBILE, AEROSPACE, AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), CHRYSLER LOCAL 1435,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In a Section 301 Action where the Union Member sues the Employer for wrongful discharge and the Union for Unfair Representation, does theDistrict Court err in dismissing the Action for the Union Member's failure to appeal to the Union, after the Union informs him that the Union will which had been fought for eighteen months, not take his grievance any further, and in response to the member's claim the Union had not properly presented his grievance, and request for relief, represents to him that nothing further can be done, thus the Union concealing from the uninformed member that the Union could by granting his appeal, reactivate his grievance, but financially depressed, member thus brings this action.

2. In a Section 301 Action, where the Union and Employer assert the defense that the Union Member failed to use his right to Appeal to the Union to reactivate the member's grievance, does the District Court err, in denying the Union Member's Motion for a stay, and/or for Dismissal Without Prejudice, when the Union Member was in fact uninformed of his right to Appeal, but claimed his Union had not properly and full represented him?

3. In a Title VII Action for Wrongful Discharge by his employer does the District Court err in granting summary Judgment, when the Plaintiff, a Black person, offers evidence that he was the only person ever discharged under the Employer's "Chronic Absentee Procedure Program," and that the Employer discriminated in favoring whites in the Program, and did not discharge two whites with comparable records.

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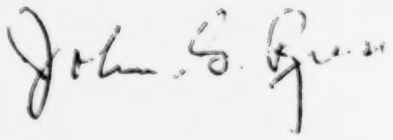
III. IN A TITLE VII ACTION, A PRIMA FACIE CASE IS MADE WHEN THE EMPLOYER FILES A REPORT SHOWING 27 PERSONS HAD ABSENTEEISM RECORDS WORSE THAN PETITIONER PLAINTIFF, A BLACK MALE, WHO WAS THE FIRST PERSON DISCHARGED BY THE EMPLOYER UNDER ITS ABSENTEEISM CONTROL PROGRAM; AND EVIDENCE IS OFFERED THAT TWO WHITES WITH WORSE OR COMPARABLE RECORDS WERE TREATED MORE LENIENTLY AND WERE NOT DISCHARGED.

CERTIFICATE OF SERVICE

3 Copies of this Petition For Writ of Certiorari are served by U.S. Mail, First Class, this September 24, 1990 on Chrysler Attorney Thomas A. Dixon,and Union Attorney Joan Torzewski.



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Counsel For Petitioner

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REFERENCE TO REPORT OF DISTRICT COURT OPINION

The Opinion and Order of the District Court, by Judge Richard B. McQuade, filed on June 22, 1989, which granted Summary Judgment for each Defendant, is reported in 728 F. Supp. 463, N. D. Ohio, W. D.

STATEMENT OF GROUNDS VISITING JURISDICTION IN THE SUPREME COURT OF THE UNITED STATES

This Petition for a WRit of Certiorari is from the Order, filed June 25, 1990, of the United States Court of Appeals for the Sixth Circuit, which affirmed the judgment and Opinion of the DistrictCourt, which granted Summary Judgment to each Defendant.

The statutory provision believed to confer jurisdiction on this Court to review the judgment in question by a Writ of Certiorari is 28 USCS Section 1254 (1), which reads in 28 USCS:

"§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give b inding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(June 25, 1948, ch. 646, § 1, 62 Stat. 928; June 27, 1988, P. L. 100-352, §2 (a), (b), 102 Stat. 662.)

STATUTES RELIED UPON

Plaintiff has brought his Action on Section 301 of the Labor Relations Management Act, (1947), 29 USC. Section 185;

and under Section 703 of Title VII of the Civil Rights Act of 1964, 42 USC Section 2000 (e) et. sequ.; and 28 USC Sections 2201 and 2202.

STATEMENT OF THE CASE

Plaintiff-Appellant Clawzelle Wiggins brings this Action against Defendant Chrysler Corporation which through a subsidiary, "Acustar," operated a factory in Perrysburg Township, Wood County, Ohio, for the manufacture of parts for Chrysler cars. Plaintiff-Appellant Wiggins was Employed continuously from his hire on October 9, 1967, and sues Chrysler for wrongful discharge in breach of the Collective Bargaining Agreement with the UAW, and claims Local 1435, and the International, were guilty of Unfair Representation in the Grievance Procedure. In his Title VII Action, Mr. Wiggins claims that Chrysler discriminated against him because heis black in disciplining anddischarging him for matters for which Chrysler did not discipline nor discharge whites.

Petitioner Wiggins claimed that

his absences were largely due to physical disabilities, as shown by Doctors' reports and Hospital records. Chrysler's "Chronic Absentee Procedure" did call for the employees with the worst rates of over 20% to be identified, counselled, and progressively disciplined if improvement was not made. The "Procedures" and discipline called for by the Collective Bargaining Agreement are summarized in a card, given Union members as follows:

"Step 1 - Notice of Absence
- Issued by Supervisor
- Prior verification of accuracy of attendance data by Attendance Counselor and Labor Relations office

"Step 2 - Written Warning
- Issued by Supervisor
- Counseling by Attendance Counselor alone when employee enters Step 2 for the first time.

Step 3 - Foreman Report and 5 Day DLO
- Issued by Supervisor
- Counseling by Attendance Counselor and Superintendent/Area Manager (Warehouse Manager) or designated representative, following assessed DLO or return from DLO.

Step 4 - Foreman Report and 15 Day DLO
- Issued by Supervisor
- Counselling by Attendance Counselor and L. R. Supervisor or designated represent ative, following return from DLO.

Step 5 - Foreman Report and 30 Day DLO
- Issued by Supervisor
- With prior agreement with Labor RElations Supervisor or designated representative, Union Attendance Counselor may counsel alone following return from DLO.

Step 6 - Discharge

Petitioner was placed in the Chronic Absentee Procedure Program on August 20, 1985, and Chrysler then discharged him on August 29, 1986, and a grievance was filed on September 2,

1986. Petitioner Wiggins alleged in his Amended Complaint, filed June 8, 1989, that the Union in the program, and in the Grievance later, failed to point out to Chrysler and to require them to comply with the Chronic Absentee Procedure Program by:

1) after an alleged counselling meeting, Chrysler from August 20, 1985, was never counselled by Chrysler;

2) in the six months ending December 30, 1985, Petition was neither notified orally or in writing, or counselled, that his attendance was not improving nor that his absences exceeded the 20% level; and likewise in the six months ending June 30, 1986; nor until his discharge on August 29, 1986;

3) nor was Petitioner attendance record reviewed by the National Attendance Council.

Petitioner also claimed that his

evidence showed that he had not, by the Contract, had sufficient unexcused absences, as even to have been put into Program.

Petitioner alleged in his Amended Complaint in Paragraph 9:

> "9. During the period beginning December 1, 1985, and ending May 31, 1986, Plaintiff's absenteeism increased due to a series of illness' which required him to miss work on the following dates:
>
> December 3-12, 1985 (dehydration and gastro-enteritis);
>
> January 6-8, 1986 (personal illness);
>
> January 29 through February 24, 1986 (knee injury);
>
> March 4-5, 1986 (personal illness);
>
> April 14-May 9, 1986 (joint effusion left knee);
>
> May 17-28, 1986 (bursitis in shoulder, back);
>
> Inall cases mentioned above, PLaintiff promptly reported his inability to report to work and submitted proper

written medical
documentation to his employer
in accordance with the terms
of the Procedure."

Petition alleged and claimed that the Union failed to represent him fairly in not presenting all the evidences to show his absences were not wilful, but due to his physical condition, as shown by the Doctor and Hospital records and reports, and further that the Union did not give due emphasis to the harm worked Petitioner by not requiring Chrysler to live up to their Contractual duties to warn him, so that he could take any needed corrective action in the Chronic Absentee Procedure Program. Further, Petitioner charged that Union in the Grievance Procedures, is not doing the same things, is not informing Petitioner of the "Pros and Cons", in the evidences and claims, raised by each side so that Petitioner could defend himself, and so that Petitioner

and his ATtorney then could likewise adequately respond, but instead, the Union left him "in the dark"; and in fact and in truth, defenseless, whereas if the Pros and Cons had been told him, Petitioner would have won his Grievance.

Petitioner also alleged and offered evidence that top UAW representation, in the National Headquarters in Detroit, as Solidarity House, admitted that the Union had not represented him properly and had "messed up."

At the conclusion of the Grievance Procedure Chrysler , through the National Attendance Council, which took over the Grievance Procedure, offered Petitioner his job back, without back pay, and with the proviso that the period from August 9, 1986, to April 1, 1988, would not be counted in Petitioner's Seniority, but would be held to be a "disciplinary layoff." Petitioner refused.

Petitioner was informed by a group of Union Officials from his Local 1435. In his Affidavit filed in Opposition to Respondents' Summary Judgment Motions, Petitioner stated in part:

> "14. On April 12, 1988, I was called down to the union office at the Chrysler plant, where I met with several union officials without an attorney. It was the first time any Union official had contacted me since the meeting between Step 2 and 3 of the grievance. They read out loud a prepared statement concerning the decision of the National Attendance Council. I had informed them again, that the decision was based on incorrect information and that the major arguments of my grievance were not presented to the NationalAttendance Council. While I did reject the reinstatement at that time, it was based on the fact that I felt I deserved the back-pay as well as the reinstatement due to the glaring errors that had been committed by the Company in implementing the Chronic Absentee Procedure as it related to me. I made these points clear to my union officials, but the major arguments that I have stated herein were not addressed

before the National Attendance Council.

15. UPon reading me the decision, and my rejection thereof at the August 12, 1988 meeting, BErnie SAilor and Robert Hammonds, President of Local 1435, indicated to me that there was nothing more that the Union could do for me, nor that I could do for myself concerning this matter,and that I had no other recourse concerning this grievance. ADditionally, no one at the Union would even tell me I should apply for unemployment compensation, even when I asked if there was any way I could obtain financial assistance during the pendency of my grievance."

Petitioner then through his attorney filed this Action on May 23, 1988. Respondents have not in this Briefs claimed that either Petitioner nor his then Attorney, knew of Petitioner's right to Appeal to the UAW to reactivate his Grievance, and Petitioner stated that no one ever told him about such a right. Petitioner in his Affidavit pointed out that he had but a ninth

grade education, and did not understand from the Solidarity issues - the Union paper which the UAW distributes to its members - that he had such a right to try to reactivate his Grievance. Since Petitioner has fought every step of the way, the best he could, despite the lad of real, good faith, representation by the Union, the record certainly calls for the inference that Petitioner was in fact and in truth ignorant of his right to appeal to the UAW to reactivate his Grievance, and reasonably so. Here, the failure at the meeting with the Union representative, the President, Mr. Hammonds, and the Grievance Handler, Mr. SAilor, to tell Petitioner of that right, whether Mr. Hammonds or Mr. SAilor, either themselves did not know of the right to appeal, or that they wilfully concealed it from

Mr. Wiggins calls for Judicial redress.

While the Grievance was going on, Petitioner sought Unemployment Compensation, was at first disallowed his claim, and then after a Hearing before the Board of Review, Unemployment Compensation, State of Ohio, was awarded relief. AT the Hearing, Chrysler was represented by their Attorney Mary Ann Whipple, and by Mr. Jerry James, Labor RelationsSupervisor, a Witness. At this Hearing, the Hearing Officer dealt with the issues of the "Chronic Absentee Procedure." The Official OPinion shows that evidence was offered on his days absent, and the reasons therefor. This Counsel, not of Counsel in any of the other stages of this case, knowsthat Mrs. Wiggins continuously in his Deposition pointed to the proof adduced at the Unemployment Hearing, as evidence of what was available to

to show Chrysler had no "just cause" to discharge him, and why Mr. Wiggins was in the right, while the issues are not altogether the same, we submit that it is relevant at this point for this Court to consider the findings in evaluating whether to take this case, and then to remand for further proceedings. At Page 5 of the Unemployment Decision, the Hearing Officer held in part:

> "The facts set forthshow that the claimant was a member of the UAW which has an agreement with Chrysler Corporation providing a Chronic Absentee Procedure. The claimant was placed on said program in 1985. The insurance department makes the decision of which illnesses are excludable and not counted against the employee's record, and which illnesses are includable and counted against the employee's record. The claimant's discharge was based on his absentee record for the period beginning December 1, 1985, and ending May 31, 1986. During this period of time, the claimant had

four leaves of absence for illness, including one hospitalization. In addition, the claimant had two other occasions when he missed two and three consecutive days of work due to illness. These periods were coded as excludable by the employer; however, the insurance department decided that these must be counted against the claimant's record. For his medical leaves of absence, the claimant supplied medical documentation. The employer has submitted the Medical Guidelines which list various illnesses and the decision of whether or not the illness is includable or excludable. For instance, absence due to disorders of the adrenal glands is excludable. However, anal fissure and fistual surgery is includable. Absences due to coronary artery disease are includable. The probative evidence before the Refe ree does not reveal the rationale behind the determination of exd udable and includable. For a medical leave of absence not to count against an employee, the employee has to be sure that he contracts an illness determined by the insurance

> group to be excIudable. Although the average person hopes to never cntraCT an illness, one does not have control over wich illness one contracts. Based on the probative evidence before the Referee, it must be determined that the claimant was discharged by Chrysler Corporation without just cause in connection with the work. No disqualification of benefits should be imposed as a result of this separation from employment."

In the district Court, the Court dismissed the 301 Action, for failure of Petitioner to exhaust his Appeal to the Union, which could have re-activated the Grievance. Petitioner had opposed that defense, by arguing Petitioner never knew of such a right until after this Action was filed and cla imed no Union person ever told him of it, not even when in 1988 the Local President and the Grievance Handler told him that his Grievance was lost, and that was all that could be done, and that there was

no way in which his Union could be of help. Petitioner did not a copy at any time of the UAW Constitution, Article 33, of that Constitution, which provides for the Appeal, is printed in the Appendix herein, as Pages Appendix 24. Petitioner also claimed that the 18 months waiting in the Grievance Procedures was sufficient delay, for one in his financially depressed condition.

The District Court also on the 301 Action denied Petitioner Motion for a Stay, during which Petitioner might undergo an Union Appeal, and further denied Petitioner's Motion to Dismiss without Prejudice with the Right to Refile, during which period Petitioner would have taken his Union Appeal.

Lastly, the District Court granted summary Judgment on the

Title IV Civil Rights Action, holding that Petitioner had not offered sufficient evidence that whites had received more favorable treatment and discipline than had Petitioner. Petitioner claimed that several whites, with records either worse than, or comparable to Petitioner's, had been given more counseling than the one meeting with Petitioner, and that several whites had more "included" or unexcused absences than Petitioner, but were not discharged.

ARGUMENT

I. UNDER THE THREE PRONG TEST DECLARED IN CLAYTON V. INTERNATIONAL, UAW, ANY STATEMENT BY A UNION OFFICIAL OR REPRESENTATIVE WHICH REASONABLY WOULD HAVE A UNION GRIEVANCE, AT THE STATE OF THE UNION'S FINAL REJECTION OF THE GRIEVANCE, NOT TO KNOW OF THE GRIEVANCE'S RIGHT TO APPEAL WITHIN HIS UNION TO REACTIVATE THE GRIEVANCE, PROVIDES LEGAL EXCUSE AND JUSTIFICATION FOR NOT TAKING THE UNION APPEAL

Here, we claim that under Rule 10 of the Rules of the Supreme Court, that there is a conflict in the decisions of the U. S. Courts of Appeal, and additionally, that there now is an important question of federal law which should be settled by this Court.

Firstly, in Clayton v. International Union, UAW, et al., 451 U. S. 679 (May 26, 1981) this court stated at Page 689:

"(6) As we stated in NLRB v. Marine Workers, supra, at 426, and in n 8, 20 L ed 2d 706, 88 S. Ct 1717, courts have discretion to decide whether to require exhaustion of internal union procedures. In exercising this discretion, at least three factors should be relevant; first, whether union officials are so hostile to the employee that he could not hope to obtain a fair hearing on his claim; second, whether the internal union appeals procedures would be inadequate either to reactivate the employee's grievance or to award him the full relief he seeks under §301; and third, whether exhaustion of internal procedures would unreasonably delay the employee's opportunity to obtain a judicial hearing on the merits of his claim. If any of these factors are found to exist, the court may properly excuse the employee's failure to exhaust."

Here, if Petitioner had taken an Appeal to the UAW Public Review Board, and had proven that the Grievance

handlers had mishandled the Grievance because of "fraud, discrimination or collusion with management." then the Petitioner Grievance could have been re-activated. Thus in the UAW Constitution, Article 33, Section 4 (i) reads:

> "(i) GRIEVANCE AND RELATED APPEALS. In any appeal to the Public Review Board, under Section 3 (f) of this Article, concerning the handling of a grievance or other issue involving a collective bargaining agreement, the Public ReviewBoard shall not have jurisdiction unless the appellant has] alleged before the International Executive Board that the matter was improperly handled because of fraud, discrimination or collusion with management, or that the disposition or handling of the matter was devoid of any rational basis."

Here, in Justice, we submit that this Court should take Jurisdiction here, and declare just what a Union

must do at the stage of the Union's final rejection of the Grievance, as was the case here. When the Union member is called to meet withseveral, not just one, Union Officials and important Union people, then the legal minimum that should be required is thatthe member be given a "Boiler Plate Form" telling the member that the Union leaders have decided not to take the Grievance any further, but that if the Union Grievance is not satisfied, that before the Union Member should take any legal action, that then the Union Member should Appeal to the InternationalExecutive Board, or the Public Review Board, or wherever the Union gives the right to appeal.

To discharge for cause a Union member from an established employer through the Union Grievance procedure, is like "Capital Punish-

ment," for that Union member.

The Unions can work out matters to provide for written documentation. AT this final stage, before the Appeal to the Union, in the real world, the Union for sure has the knowledge of the Appeal right, or doesn't, and if the local President and Grievance Handler don't know, how in all Justice can the Courts expect the Union Members to know. It's either fraudulent concealment, and if it is that, then most assuredly this most renowned Court in the world, should not give such concealment its Judicial Stamp of Approval. If it's a case where in fact the Union President, and Union Grievance Handler didn't know, then the Courts should not require the Union Members to know. In either event, the best considered Federal policies of good

Industrial Relations call then for the worker to have the Right "to go to Court."

In the present case at Bar, the Sixth Circuit Court of Appeals has upheld what the District Court thought was in line with prior Sixth Circuit decisions. The Conflict in opinions between the Circuit is recognized by the able District Judge Richard B. McQuade, in this case in Wiggins v Chrysler Corporation, 728 F. Supp. 463 (USD Ct., N. D. Ohio, W. D. 1989) where the Court stated, in referring to the three prong test in Clayton v. International, UAW, Supra, in 728 F. Supra at Page 466:

> "The burden is on the employee to show that his failure to exhaust intraunion remedies should be excused because of one of the factors enumerated above. Monroe v. International Union

723, F.2d 22, 25 (6th. Cir. 1983) (per curiam). Contra Johnson v. General Motors Corp., 641 F. 2d 1075, 1079 (2d Cir. 1981). Whether to excuse the exhaustion requirement is a matter of this court's discretion. Clayton 451 U. S. at 689, 101 S. Ct. at 2095.)

The issue of the holding is Johnson, supra, is that the Union Member could rely on what the Union representative said that nothing further could be done. So, with Petitioner Wiggins.

Here, the UAW Counsel will claim that the UAW sends each member issues of Solidarity, which so informs the member of the member's rights to appeal to the UAW to reactivate the Grievance. Mr. Wiggins with a ninth grade education said he didn't comprehend such alleged notices. If the Courts hold Mr. Wiggins should have known, should the Local President Mr. Hammonds and the Grievance Handler, Mr. Sailor, have known, as well as

the others? Does Fraud by the Union excuse the Duty to take the Union Appeal?

Everyone when faced with bad news tends to become tense, and not as able to think clearly. So here. Mr. Wiggins was without a job for over 18 months, financially and, we submit, emotionally depressed. But there was no written Notice given at such a crucial time. To require a written Notice is not burdensome, and probably, would save everyone's time in the long run.

The American people expect, and rightfully so, that this Court will make decisions which in the real world are just, intelligent, practical, common sense, but not based upon myth or a legal fiction.

One of the grounds for requiring the Union Members to appeal to his or her Union is to save

law suits, and also to narrow the issues.

The Appeal and ultimate goal sought by Petitioner Wiggins is in keeping with the best and brightest traditions of the United States.

We submit that the better reasoned decision on the issue as to what circumstances, and the burdens of proof on Summary Judgment Motions, justify the Union Members is not taking the Appeal to his Union to re-activate the Grievance, is Johnson v. General Motors, 641 F. 2d 1075, (CA 2, 1981), where the District Court's granting of Summary Judgment, under facts substantially similar to those in the case at Bar, was reversed. The Second Circuit Opinion in Johnson, Supra, in 641 F. 2d at Page 1075 comprehensively and ably discusses this problem as follows:

These provisions offer no guidance concerning the filing of joint complaints against the Local and the International, as in this case. Moreover, it is not clear that article 32 would apply to all aspects of a violation of the duty of fair representation, because article32 refers only to high moral and ethical standards.5

Further, the PRB can exercise jurisdiction over unfair representation claims only if the member alleges bad faith, whereas a court's jurisdiction in such claims isnot so limited.6

Article 33 sets forth an even more complex maze of appeals procedures for challenges to local union action.7

ACcording to certain affidavits submitted by the International, the member must first seek approval for appeal from the membership of his local union (unless this step is waived). He may then appeal to the International Executive Board and, in turn, to the Constitutional Convention Appeals Committee of the International Union or to the Public Review Board. (Sections 1-8)[8] No provision appears in Article 33 relating to a challenge to alleged wrong-

ful conduct of the International, either alone or in conjunction with the Local.

Given the complexity of the UaW procedures, we cannot accept the conclusion that the procedures are reasonable as a matter of law. The Unions have presented no documentation in the record or in the cases cited, upon which the reasonableness of the procedures can be assumed. ACcording to commentary on the subject, only one appeal to the Public Review Board in its twenty-eight history has resulted in a finding that the union breached its duty of fair representation. See Fox & Sonenthal. Section 301 and Exhaustion of Intra-union Appeals: A Misbegotten Marriage, 128 U. Pa. L. Rev. 989, 1008 n. 75 (1980).

Moreover, on the record before us, we see no basis for believing that a typical rank and file union member could understand and follow the procedures necessary to pursue the intra union appellate remedies, especially considering the procedural intricacies contained in articles 32 and 33

of the UAW Constitution.[9] Here, in particular, because Johnson alleges that he received no information on the available remedies and that the Union president, in effect, rejected Johnson's request for assistance and led him to believe that internal appeals were exhausted, a trial court cannot merely assume that the unions have offered him and his fellow union members a reasonable intraunion remedy to contest allegedly improper action by leadership of the Local or the International. Indeed, our review of these complex constitutional procedures convinces us thata union member would need considerable expert assistance either from his union or from some other source to work his way through this maze of union procedures.

The district court, in applying the exhaustion defense to Johnson as the basis for dismissing the lawsuit, relied on Newgent v. MOdine Manufacturing Company, 495 F .2d 919 (7th. Cir. 1974)

There, under similar circumstances, the court dismissed the union member's claim for failure to exhaust intraunion remedies. The district court cited the following argument from the Newgent case:

""By becoming a member of the Union Newgent was contractually obligated to exhaust union remedies before resorting to a court action. ***Necessarily implied in this obligation is the duty to become aware of the nature and availability of union remedies. Newgent was not justified in remaining in ignorance of the provisions governing his own union or, in fact, relying on a statement by an officer that there was nothing he could do."" Id., at 927-28 (Dist. Ct. op. at 4.)

We do not agree. The union changes roles in a case of this kind. From the representative of the plaintiff under the collective bargaining agreement, the union becomes the plaintiff's opponent in defending its right to terminate a grievance.

Thus, when the union member seeks relief through intra-union procedures, the Local and the UAW will likely be in a posture adverse to their member. Under such circumstances, a duty ought to rest upon the union to inform its members of available internal remedies. See Geddes v. Chrysler Corp. , supra, 608 F. 2d at 264; Detroy V. American Guild of Variety ARtists, supra. 286 F. 2d at 81; Cammarata v. Ice Cream Drivers & Employees Union, Local 757, supra, 441 F. Supp. at 701. The nature and extent of information disseminated by the International and Local unions to its members, as compared to the complexity of the remedies, bears on the court's determination of the reasonableness of the intraunion remedy.

Although other courts have found the UAW proeedures adequate, they did not address the question of reasonableness. See, e. g. Clayton v. ITT Gilfillan, supra. 623 F .2d at 566; BAldini v, Local No. 1095, UAW, supra, 581 F .2d at 149; Reid v. UAW, Local 1093, 80 L. R. R. M. 2886, 2892 (N. D. Okla 1972). These

decisions, moreover, relied either on conclusory affidavits or on opinions that accepted without analysis a finding of adequacy. The Union's burden of showing reasonableness cannot rest on such assumptions.10

(9-11) The exhaustion defense to a union member's suit for failure of the Union to provide fair representation may not be successfully asserted unless the unions establish that the intra-union remedies are in fact (1) adequate, (2) not futile, and (3) reasonable under the circumstances.

Here, the Union failed to establish the reasonableness of the exhaustion defense and Johnson at least raises an issue of fact on the reasonableness of applying the exhaustion defense against the Local and UAW. ACcordingly, the entry of a summary judgment of dismissal against the Union must be reversed and the case remanded to the district court for a determination of the reasonableness of the Union's appellate procedures in this situation.11

II. IN A SECTION 301 ACTION, THE DISTRICT COURT SHOULD ALLOW A PLAINTIFF UNION MEMBER A REQUESTED STAY SO THAT THE UNION MEMBER MAY PURSUE HIS OR HER APPEAL TO THE UNION FOR RELIEF OR TO REACTIVATE THE GRIEVANCE: OR SHOULD ALLOW THE UNION MEMBER TO DISMISS HIS OR HER ACTION, WITH THE RIGHT TO REFILE IN A STIPULATED TIME. IF THE DISTRICT COURT FEELS THAT THE UNION MEMBER IS AT FAULT IN NOT HAVING PURSUED THE UNION APPEAL BEFORE, SANCTIONS, OTHER THAN SUMMARY JUDGMENT, SHOULD BE INVOLVED.

Much of what has been stated before implicatly applies here.

This Counsel has not found any so-called "cow case" holdings -- cases that stand on "All Fours" -- with these issues.

In NLRB v. Industrial Union of Marine and Shipbuilding Workers of America, etc., 391 US 418, (1968) in referring to the 4 months limit put on Unions by the Labor-Management Reporting and Disclosure Act of 1959, 29 USC § 411(a)(4), for requiring Infra-Union appeals before instituting lawsuits against the Union,

this Court stated at page 426: We conclude that "may be required" is not a grant of authority to unions more firmly to police their members but a statement of policy that the public tribunals whose aid is invoked may in their discretion stay their hands for four months, while the aggrieved person seeks relief within the union. We read it, in other words, as installing in this labor field a regime comparable to that which prevails in other areas of law before the federal courts, which often stay their hands while a litigant seeks administrative relief before the appropriate agency.

In Ritza v. International Longshoremen's and Warehousemen's Union, et al, 837 F2d 365, (CA 9, 1988) the Court held that the Union's motion to Dismiss or for Summary Judgment, was a Dismissal without prejudice, as to the Section 301 Actions. In 837 F.2d at

Page 368, the opinion read:

> "However, we find nothing in the district court's order or findings of fact and conclusions of law indicating that summary judgment was granted. RAther, it appears that the district court dismissed the section 301 claims without prejudice.3

The issue was not decided in Hester V. International Union of Operating Engineers, 818 F.2d 1537 (CA 11, 1987), in Footnote 24 at Page 1546 stated in part:

> "NLRB v. Industrial Union of Marine and Shipbuilding Workers, 391 U. S. 418, 88 S. Ct. 1717, 20 L. Ed. 2d 706 (1968). The Industrial Union Court construed the provision as permitting a district court, in its discretion to stay a union member's action until union remedies have been exhausted or unsuccessfully sought, but only for a period of up to four months. 391 U. S. at 428, 88 S. Ct. at 1724. See also Chapa v. Local 18 737 F.2d 929, 931

(11th. Cir 1984)
Keene v. International Union of Operating Engineers, 569 F.2d 1375, 1379 (5th Cir. 1978).

III. IN A TITLE VII ACTION, A PRIMA FACIE CASE IS MADE WHEN THE EMPLOYER FILES A REPORT SHOWING 27 PERSONS HAD ABSENTEEISM RECORDS WORSE THAN PETITIONER PLAINTIFF, A BLACK MALE, WHO WAS THE FIRST PERSON DISCHARGED BY THE EMPLOYER UNDER ITS ABSENTEEISM CONTROL PROGRAM; AND EVIDENCE IS OFFERED THAT TWO WHITES WITH WORSE OR COMPARABLE RECORDS WERE TREATED MORE LENIENTLY AND WERE NOT DISCHARGED.

Plaintiff at the District Court offered evidence that Ms. Blasingim's record for comparable period, was 46%, worse than Petitioner's, but she was counselled twice, and Petitioner had but one at the outset, and she was not discharged.

Likewise, as to Chrysler employee, Mr. DiLucia, white, with absence rate of 80.3%, was counseled a second time, and not discharged.

Here, since the employer has all the records, is most interested in administering its Control Program, the Burdenof Proof on Summary Judgment

after some evidence is brought forward, should be on the employer. Such is practical, efficient, and Just. If a Plaintiff needlessly takes the Court's time, then proper sanctions may be invoked. We cite:

McDonald Douglas Corporation v. Green, 411 US 792 (1973); and Texas Department of Community AFfairs v. Burdine, 450 US 248,252-253 (1981).

CONCLUSION

For this Court to grant Certiorari is to take a step forward in an area where the discharged worker has little if any power in the struggle that he or she faces.

Judicial economy deserves high and effective support. The defense of failure to exhaust one's intra-union appeals, is, we submit, a defense, much like the now dimly

viewed defense of contributory negligence. In the real world, the Union Members, even in the well run and ordinarily to be commended UAW, simply at a time of crisis is not aware, nor isthe ATtorney to whom the discharged Union Member turns, aware of such right of Appeal.

Here, and in every lawsuit, once that the Union or Employer raises this defense, the Trial Court can order a Stay or allow a Dismissal with the Right to Refile within a Stipulated Time,, and thus accomplish the proper goals of Judicial Economy.

The relief we seek, will work to keep high the esteem and respect with which all Americans and the world should give this Honorable Court.

We respectfully request this

Court to grant Certiorari.

We close with the memorable words of Judge Cudahy in Dober v. Roadway Express, Inc., 707 F.2d 292, (CA 7, 1983) in his concurring in result Opinion at Page 298:

> "Many discharged employees are undeserving, but some are not. And no one is more powerless than the employee who has incurred the open hostility of his employer and the unspoken disfavor or indifferent of those in control of his union. The majority speaks of recourse through the democratic process, but this is of scant value to the worker who has beenfired. In the present effort to close and lock the courthouse doors, it is no accident that the powerless are the first to suffer. I cannot therefore agree with the views announced today by the majority.

Respectfully submitted,

John G. Rust

John G. Rust
Petitioner's Counsel

90-684

(2)

Supreme Court, U.S.
FILED
SEP 24 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

CLAWZELLE WIGGINS,
Petitioner,

versus

CHRYSLER CORPORATION,
Respondent,

ACUSTAR, INC.,
Respondent,

UNITED AUTOMOBILE, AEROSPACE, AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), CHRYSLER INTERNATIONAL,
Respondent,

UNITED AUTOMOBILE, AEROSPACE, AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), CHRYSLER LOCAL 1435,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

John G. Rust
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APPENDIX

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CERTIFICATE OF SERVICE

3 copies of the foregoing Appendix are served on Chrysler Attorney, Thomas A. Dixon, and on UAW Attorney Joan Tarzewski, this September 24, 1990.

John G. Rust
Petitioners Counsel

No. 89-3662

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

CLAWZELLE WIGGINS, :Filed: June 25, 1990

Plaintiff-Appellant

:ON APPEAL FROM THE
v. UNITED STATES
:DISTRICT COURT FOR
CHRYSLER CORPORATION; THE NORTHERN
ACUSTAR, INC.; :DISTRICT OF OHIO
UNITED AUTOMOBILE,
AEROSPACE,
AGRICULTURAL
IMPLEMENT WORKERS OF
AMERICA (UAW),
CHRYSLER INTERNATIONAL;
UNITED AUTOMOBILE,
AEROSPACE,
AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA
(UAW),
CHRYSLER LOCAL 1435

Defendants-Appellees.

BEFORE: MERRITT, KEITH and JONES,
Circuit Judges.

THIS CAUSE. Having come to be heard upon the record, the briefs, and the oral argument of the parties, and upon due consideration thereof.

IT IS ORDERED that the judgment of the district court be, and it hereby is, affirmed upon the opinion of the district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

CLAWZELLE WIGGINS, *FILED: June 22 1989

Plaintiff, *

vs. *No. C88-7349

CHRYSLER CORPORATION, et al., *

Defendants. *OPINION AND ORDER *

* * * * * * * * * *

This case is before the court on the defendants' motions for summary judgment. The issue in this case is whether this court should exercise its discretion and excuse the plaintiff's failure to exhaust intraunion remedies.

The plaintiff, Clawzelle Wiggins, was employed by defendant Chrysler Corporation through its subsidiary, Acustar, Inc., (hereinafter both corporations will be referred to as "Chrysler"), at its plant in Perrysburg, Ohio, from October 9, 1967 until August

29, 1986. PLaintiff was employed as a maintenance worker and was a member of defendants UAW International and Local 1435 (hereinafter "Union"). The terms and conditions of plaintiff's employment were governed by a collective bargaining agreement entered into by Chrysler and the Union.

The collective bargaining agreement sets forth a "Chronic Absentee Procedure." The Procedure applies "to employees who avoid corrective, progressive discipline for absences by attributing them to frequent and recurring illnesses." Plaintiff's Memorandum in Opposition to All Defendants' Motions for Summary Judgment, Exhibit 1. Employees with the worst attendance records (rates of absenteeism above 20%) are identified by the Union Attendance Counselor and the Labor Relations Supervisor. Such employees are counseled that their attendance records are unsatisfactory.

If the employee's attendance record does not improve after the counseling session, the employee is notified in writing that his attendance record has not improved. The employee's record is then reviewed by the Labor Relations Supervisor and the Union Attendance Counselor. The Labor Relations Supervisor will either counsel the employee again or discipline the employee. In extreme cases, the employee may be terminated.

If the employee is disciplined or terminated, the Union may submit a grievance at the third step of the Grievance Procedure within five working days. This grievance may be appealed to the Appeal Board. In the case of Termination, if the grievance is appealed to the Appeal Board, the National Attendance Council may first review the merits of the case and, within 15 working days of the date of its review, may rescind, modify or agree with the termination.

The decision of the Council is final and binding and is not subject to further appeal under the collective bargaining agreement. If the National Attendance Council cannot reach a decision, the case is referred back to the Appeal Board for disposition. If the Appeal Board is unable to settle the case, it may be appealed to the Impartial Chairman.

On August 20, 1985, the Plaintiff was counseled by the Labor Relations Supervisor and his Union Representative, Bernie Sailor, that his absentee rate for the period December 31, 1984 through June 30, 1985 was 23.9%.[1]

---

1 Although the Chronic Absentee Procedure calls for counseling by the Labor Relations Supervisor and the Union Attendance Counselor, a Union Attendance Counsel had not been appointed at the time Plaintiff was counseled. The Union was represented at plaintiff's counseling session by Bernie Sailor, plaintiff's Union Representative.

The plaintiff was informed that if his attendance record did not improve significantly, he would be counseled again, disciplined or terminated. The plaintiff objected to Chrysler's initiation of the Chronic Absentee Procedure because he alleged that many of the days on which he was absent from work were not includable in his absenteeerate because they were days he spent in the hospital. Plaintiff appealed to the National Attendance Council which found that Chrysler had correctly determined the plaintiff's absentee rate and appropriately invoked the Chronic Absentee Procedure.

The plaintiff's attendance record was evaluated for the sixth-month period ending May 30,]986. Chrysler determined that his rate of absenteeism for the period was 46.7%. The plaintiff was discharged on August 29, 1986.

The Union filed a grievance on behalf of the plaintiff on September 2,

1986. Chrysler denied the grievance, and the Union appealed to the National Attendance Council. On April 1, 1988, the National Attendance Council decided that the plaintiff should be offered reinstatement. Upon his return to work, his discharge would be changed to a disciplinary layoff, without backpay for the period during which time he was away from the plant. The plaintiff refused reinstatement on those terms. He did not pursue internal Union appeal procedures to challenge the Union's handling of his grievance.

The plaintiff filed this case in May, 1988, alleging several causes of action. An amended complaint was filed June 8, 1989, alleging two causes of action: (1) in Count I, the plaintiff alleges that Chrysler breached the collective bargaining agreement and the Union breached its duty of fair representation in violation of §301 of the Labor Management Relations Act, 29 U.S.C. §185; and (2) in Count II, the plaintiff

alleges that Chrysler discriminated against him on account of his race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

Summary judgment is appropriate when the moving party shows that "there is no genuine issue as to any material fact and that moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (c). "(T)his standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2510 (1986) (emphasis in original). In deciding a motion for summary judgment, this court will view the evidence in the light most favorable to the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 106 S. Ct. 1348,

1356-57 (1986). The non-moving party, however, may not rest upon the allegations or denials of the pleadings. Rule 56 (e) requires that the non-moving party "set forth specific facts showing there is a genuine issue for trial." Fed. R. Civ. P. 56(e). See also Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2553 (1986).

An employee seeking a remedy for his employer's breach of the collective bargaining agreement and his union's breach of its duty of fair representation must exhaust the grievance and arbitration procedures established by the collective bargaining agreement before maintaining a § 301 suit. Republic Steel Corp. v. Maddox, 379 U.S. 650, 652-53 (1965). The employee must also exhaust internal union grievance and appeals procedures before maintaining a § 301 suit unless: (1) union officials are so hostile that the employee could not possibly obtain a fair hearing; or (2) the

intraunion procedure would be inadequate either to award the full relief the employee seeks under § 301 or to reactivate the employee's grievance; or (3) exhaustion of intraunion procedure would unreasonably delay the employee's opportunity to obtain a judicial hearing on the merits of his claim. Clayton v. International Union, 451 U.S. 679, 689 (1981). The burden is on the employee to show that his failure to exhaust intraunion remedies should be excused because of one of the factors enumerated above. Monroe v. International Union, 723 F. 2d 22, 25 (6th Cir. 1983) (per curiam). Contra Johnson v. General Motors Corp., 641 F. 2d 1075, 1079 (2d Cir. 1981). Whether to excuse the exhaustion requirement is a matter of this court's discretion. Clayton, 451 U.S. at 689.

The plaintiff does not dispute that the Constitution of the International Union requires that Union members

aggrieved by any Union action must first exhaust intraunion remedies before initiating a court action to redress his grievance. See Motion of Defendants UAW International and UAW Local 1435 for Summary Judgment, Exhibit 8. The plaintiff submits three reasons why this court should exercise its discretion to excuse his failure to exhaust intraunion remedies.[2]

First, the plaintiff argues that there is a genuine issue of material fact as to whether he can be afforded the complete relief he seeks in his § 301 suit against Chrysler and the Union. The plaintiff is seeking money damages, reinstatement, expungement from his employment record of all evidence of any discharge or proceeding related thereto, reinstatement of all his

---

2 The plaintiff has not alleged that Union officials are so hostile to him that it would be impossible to obtain a fair hearing.

seniority rights under the collective bargaining agreement, expungement of all his recorded absences, and attorneys' fees and costs. The thrust of plaintiff's argument is that Clayton requires that his failure to exhaust intraunion remedies be excused because there is an issue of fact as to whether each item of relief that he seeks in his § 301 suit is available to him through intraunion remedies. The plaintiff's analysis of Clayton is flawed. The Court stated that an employee should not be required to exhaust intraunion remedies where "the internal union appeals procedures would be inadequate either to reactivate the employee's grievance or to award him the full relief he seeks under § 301." Clayton, 451 U.S. at 689 (emphases added). The plaintiff in Clayton was not required to exhaust intraunion remedies because even if he had invoked intraunion remedies, the union would

not have been able to pursue his grievance because it had failed to notify the employer within 15 days of the employer's decision that the union intended to seek arbitration of Clayton's grievance. The Court noted:

> The UAW informs us that "(s)ome employers and unions have, through collective bargaining, agreed to allow the reinstatement of withdrawn grievances where a union tribunal reverses the union's initial decision. This is true, for example, in the current UAW contracts with the major automobile and agricultural implement manufacturers." Brief for Respondents in No. 80-5049, p. 18, no.40. In such cases, the relief available through the union's internal appeal procedures would presumably be adequate.

Clayton, 451 U.S. at 691, n.18. Chrysler and the Union have entered into such an agreement in this case whereby an employee who is successful in internal Union appeals may have his grievance reinstated into the grievance procedure at the level at which the

original disposition of the grievance occurred. Motion of Defendants UAW International and UAW Local 1435 for Summary Judgment, Exhibit 11. In Monroe v. International Union, the Sixth Circuit held that the plaintiff had failed to show the inadequacy of intra-union remedies where the employer agreed to reinstate a grievance if the employee were successful in the intraunion appeals process. 723 F.2d at 25. Accord Wozniak v. International Union, 842 F. 2d 633, 635 (2d Cir. 1988). Cf. Hill v. General Motors Corp., 697 F. Supp. 1274, 1278-79 (W. D. N. Y. 1988) (intraunion remedy held to be inadequate despite employer's agreement to reinstate grievance because plaintiff was required to waive claims for backpay or damages against employer in return for reinstatement of the grievance and because local union no longer existed and international union

disclaimed responsibility for the debts of a defunct local.)

The plaintiff's second argument is that because it took over 18 months for the National Attendance Council to process his appeal, to exhaust intraunion remedies would unreasonably delay his opportunity to obtain a judicial hearing on the merits of his claim. The court does not agree. The fact that the plaintiff spent at least 18 months pursuing contractual remedies under the collective bargaining agreement is irrelevant to whether his pursuit of intraunion remedies would unreasonably delay his day in court. See Curry v. Ford Motor Co., 646 F. Supp. 261, 264 (W. D. Ky. 1983). The key word in analyzing the third Clayton factor is "unreasonably." The plaintiff has taken no action whatsoever in pursuit of his intraunion remedies and has presented no evidence that such a pursuit would

result in an unreasonable delay in filing a § 301 suit. Compare Ruzicka v. General Motors Corp., 523 F. 2d 306, 311 (6th Cir. 1975) (court held that pursuing intraunion remedies for 27 months was sufficient exhaustion of those remedies to permit a § 301 suit), cert. denied, 464 U.S. 982 (1983), with Willette v. Ford Motor Co., 583 F. 2d 852, 855-56 (6th Cir. 1978) (failure to pursue intraunion remedies at all bars plaintiff's § 301 suit).

The plaintiff's third argument in favor of excusing him for failure to pursue intraunion remedies is that the Union failed to inform him as to the status of his grievance and the available intraunion remedies. The plaintiff's argument is premised on a mistaken notion of the Union's duty. The Union is not required to inform its members of intraunion remedies. Monroe v. International Union, 723 F.2d at 26.

The plaintiff does not dispute that he received a copy of the UAW Constitution and Solidarity, the Union's weekly newsletter. The plaintiff contends that despite his receipt of these documents outlining his intraunion remedies, his ninth-grade education prevented his understanding them fully. The plaintiff's contention is not persuasive. Even if the court were to agree reluctantly that a ninth-grade education is insufficient to read and comprehend the Union Constitution and newsletter, the plaintiff has had the benefit of an attorney since at least May, 1988, when he filed his suit. If no one else was able to apprise him of his intraunion remedies and duty to exhaust them before filing a § 301 suit, his attorney should have been able to do so. See Wozniak, 842 F.2d at 636 (" (The employee) was represented by an attorney who had

the necessary training to read and understand the union constitution.").

Because the plaintiff has failed to make the requisite showing to excuse his failure to exhaust intraunion remedies, Chrysler's and the Union's motions for summary judgment as to Count 1 of the amended complaint are sustained.

In order to prove that he has been the victim of race discrimination in violation of Title VII, the plaintiff must set forth a prima facie case by showing that he was treated differently than similarly situated white employees. McDonnel Douglas Corp. v. Green, 411 U.S. 792, 804 (1973). The plaintiff has filed to make the requisite showing for a prima facie case.

The plaintiff's evidence shows that 21 employees had a rate of absenteeism higher than his own from December 31, 1985 through June 30, 1986. The plaintiff alleges that

two of these employees, Caryl Blasingham and Joe DiLucia, were treated differently than he. First, the plaintiff has produced no evidence as to the race of these two employees. Second, assuming arguendo that these two employees are white, it does not appear from their attendance records that they were treated differently than the plaintiff. Ms. Blasingham was placed in the Chronic Absentee Procedure program and was counseled in April, 1985. Following this counseling session, her attendance improved and she was released from the program. Her rate of absenteeism rose above the 20% threshold, however, in 1986, and she was placed in the program again. Contrary to the plaintiff's assertions, Ms. Blasingham did not receive two counseling sessions following a continuous period of high absenteeism. Therefore, she was not treated differently than the plaintiff. Mr. DiLucia was placed in the program

and counseled in November, 1986. By February, 1987, his rate of absenteeism fell below the 20% threshold. Thus, Mr. DiLucia was not treated differently than the plaintiff. Because the plaintiff has failed to show that he was treated differently than similarly situated white employees, he has failed to state a prima facie case, and Chrysler is entitled to summary judgment as to his Title VII claim.

It is therefore

ORDERED that the defendant's motions for summary judgment are sustained;

FURTHER ORDERED that this case is dismissed at plaintiff's costs.

Richard B. McQuade, Jr. (s)
UNITED STATES DISTRICT JUDGE

Toledo, Ohio
June 21, 1989

CONSTITUTION

of the

INTERNATIONAL UNION

United Automobile
Aerospace and
Agricultural Implement
Workers of America
UAW[R]

Adopted at Anaheim, California
June, 1986

ARTICLE 33

Appeals

Section 1. WHAT MAY BE APPEALED. Any suborinate body or member thereof shall have the right under this article to appeal any action, decision, or penalty by any of the following unless otherwise provided:

(a) The International Union, its International Executive Board or any of its Officers, Regional Directors or International Representatives;

(b) Any adminstrative arm of the International Union, including its National Departments and Bargaining Councils;

(c) A Local Union, or any of its units, committees, officers, committeepersons or stewards; or

(d) Any other subordinate body of the International Union. A failure or refusal to act by any of the foregoing, where it allegedly results in an injury, may also be appealed.

Section 2. LEVELS OF APPEAL. This specifies the levels of appeal for

various types of cases.

(a) The normal route of appeal is: FIRST, to the membership or delegate body immediately responsible for the official, officer, action or decision under challenge; SECOND, to the International Executive Board, unless the appeal begins there; and THIRD, to the Convention Appeals Committee or Public Review Board, as may be appropriate. This normal route of appeal shall be followed in all cases, except where this Constitution makes specific provision for an alternate route of appeal. For purposes of illustration, in the following common cases the normal route of appeal is as follows:

In any challenge to the handling or disposition of a grievance: Where the challenge is against

a Local Union committeeperson, steward, Bargaining Committee, officer or other Local Union Official -- the levels of appeal are first to the unit of an Amalgamated Local Union, then to the Union; then to the International Executive Board and then to the Convention Appeals Committee, or where appropriate the Public Review Board. Where the challenge is against an International Representative, Regional Director, International Officer or National Department -- the levels of appeal are first to the International Executive Board, and then to the Convention Appeals Committee, or where appropriate to the Public Review Board.

For any decision of a Local Union, or unit of an Amalgamated Local Union, on a Trial Committee's recommendation -- the levels of appeal are first to the International Executive Board and then to the Convention Appeals Commitee or the Public Review Board.

For disputes or questions in controversy, including all questions involving interpretation of this Constituion by the International President under Article 13, Section 8 -- the levels of appeal are to the International Executive Board and then to the next Constitutional Convention.

For any decision of the International President under Article 48, Section 5 -- The levels of appeal are to the International Executive Board

and then to the Convention Appeals Committee or the Public Review Board.

(b) In the types of cases listed below, the appeal shall be limited as specified:

For any action or decision by a national or corporate bargaining council or sub-council, or by a national or regional wage-hour council or sub-council, the route of appeal shall be directly to the International Executive Board. There shall be no further appeal from the decision of the International Executive Board.

For any action or decision pertaining to the following matters; sports and other recreational activities; rulings of the Chair on procedural questions arising during Local Union membership

and other meetings; the appointment and/or removal of appointed officials on Local Union committees; and the sending of authorized members from a Local Union to any convention, conference, or other meeting, whether sponsored by the UAW or some other organization, except for the UAW's Constitutional Convention; unless Article 46 Section 1, or some other substantive provision of this Constituion is implicated, the appeal shall be to the membership of the Local Union, or in the case of an Amalgamated Local Union, first to the membership of the appellant's unit, if necessary, and then to the delegate body or general membership of the Amalgamated Local Union. There

shall be no further appeal from the decision of the membership of the Local Union or Amalgamated Local Union.

For any action or decision pertaining to the seating of members at any conference or other meeting sponsored by the UAW, if there is a Credentials Committee for the conference or meeting, the appeal shall be first to the Credentials Committee and then to the general delegate body of the conference or meeting. If there is no Credentials Committee for the conference or meeting, the route of appeal shall be directly to the Director of the National Department of Region responsible for the conference or meeting. There shall be no further appeal from the decision of the general delegate body or the Director of

the National Department or Region, as the case may be.

For any action or decision pertaining to the appointment or removal of special purpose representatives, such as Benefit Representatives or Health and Safety Committeepersons by a National Department under the provisions of a collective bargaining agreement, the appeal shall be directly to the International Executive Board. There shall be no further appeal from the decision of the International Executive Board.

For an interpretation of a collective bargaining agreement by a National Department or Regional Director, where the interpretation is so obviously correct that no purpose will be

served by an appeal, and where it is consistent with other provisions of this Constitution and International Union policy, the appeal shall be directly to the International President. There shall be no further appeal from that decision.

Section 3. PROCEDURES AT EACH LEVEL OF APPEAL. This Section specifies the procedures at each level of appeal. In addition, any appeal is subject to the general requirements of Section 4 of this Article. Where this Constitution makes specific provision for alternate procedures, those procedures shall control.

(a) LOCAL UNION. An appeal to the Local Union may be made at a meeting of the membership body, or may be made in writing addressed to the Recording Secretary. When no regu-

larly scheduled meeting of the membership body is held within forty-five (45) days of receipt of the appeal, the Local Union Executive Board may consider and rule on the appeal.

(b) AMALGAMATED LOCAL UNION. In an Amalgamated Local Union an appeal must be made first at a meeting of the membership body of the appellant's unit or in writing addressed to the Recording Secretary or Chairperson of the appellant's unit. When no regularly scheduled meeting of the membership body of the unit is held within forty-five (45) days of the receipt of the appeal, the unit Committee or unit Executive Board may consider and rule on the appeal.

An appeal from the unit is made to

the Amalgamated Local Union's delegate body, where such exists, or to the general membership meeting when no delegate body exists. This appeal shall be taken by submitting a written appeal to the Amalgamated Local Union's Recording Secretary. When no membership or delegate body meeting is held within forty-five (45) days of receipt of this appeal, the Local Union Executive Board may consider and rule on the appeal. The Amalgamated Local Union shall review the appeal, with the aid of an investigating committee or otherwise, and shall determine the appeal; but if a unit Trial Committee is involved in the proceedings, it shall not select its own Trial Committee to retry the case.

(c) OTHER SUBORDINATE BODIES. An appeal to other subordinate bodies, in matters within their areas of responsibility under this Constitution, may be made at a meeting of the membership or delegate body or may be made in writing to the Recording Secretary. When no regularly scheduled meeting of the membership or delegate body is held within forty-five (45) days of receipt of the appeal, the Executive Board of the subordinate body may consider and rule on the appeal.

(d) INTERNATIONAL EXECUTIVE BOARD. An appeal to the International Executive Board shall be made in writing, signed by the member(s) and addressed to the International Executive Board in care of the International President. The appeal shall set forth

the action or decision being appealed, shall be as specific and detailed as possible, and shall include all information available in support of the appeal.

APPELLATE CASES. The International Executive Board has appellate jurisdiction to consider and decide all appeals submitted to it from any decision or action of a Local Union, Amalgamated Local Union or other subordinate body; except in the relevant types of cases set forth in Section 2(b) of this Article, the International Executive Board shall entertain an appellate case only when it has been ruled upon by the appropriate membership or delegate body. In this sort of appeal, the appellant should also send a copy of her/his appeal to that body's Recording Secretary.

Upon receipt of an appeal, the International President shall secure from the Local Union, Amalgamated Local Union or other subordinate body, a complete statement of the matters in issue, including copies of all charges and records, minutes, transcripts of testimony and other material relating to the appeal.

ORIGINAL MATTERS. The International Executive Board has original jurisdiction to consider and decide all appeals submitted to it from any decision or action of an International Officer, Regional Director, International Representative or any administrative arm of the National Department of the International Union, except in the relevant types of cases set forth in Section 2(b) of this Article.

DISPOSITION BY AN APPEALS COMMITTEE.

The International Executive Board shall appoint a two (2) member Appeals Committee to consider the appeal and make recommendations. This Appeals Committee shall be composed of members of the International Executive Board, but shall not include the Regional Director of the region from which the appeal originates. The appeal and any information secured by the International President shall be forwarded to the Appeals Committee. After a review of the appeal and record, the Appeals Committee may hold a hearing before either the full Committee or in its discretion one of its members unless the Appeals Committee concludes that no useful purpose would be served by a hearing, in which event the Appeals

Committee in its discretion may make recommendations on the appeal without a hearing. The Appeals Committee shall make a recommendation which, together with the full record, shall be submitted to a Nine (9) Member Committee of the International Executive Board, of which Five (5) members, or their designee(s), shall constitute a quorum. The Nine (9) Member Committee shall consider the record, together with the Appeals Committee's Recommendations, and shall make a decision on the appeal.

DISPOSITION BY THE INTERNATIONAL PRESIDENT. The International President may, in his discretion, decide an appeal rather than submitting it to an Appeals Committee. In such a case, the International President may designate a representative to

conduct any investigation or hearing deemed necessary, in accordance with the procedures of this Sub-section. The International President shall base her/his decision on the files and records of the case, and such briefs as may be submitted. In any appeal involving the handling or disposition of a grievance against an employer, the decision of the International President shall be submitted to the Nine (9) Member Committee of the International Executive Board.

REVIEW BY THE FULL INTERNATIONAL EXECUTIVE BOARD. Both where the appeal has been decided by the Nine (9) Member Committee of the International Executive Board and where it has been decided by the International President, copies of the decision shall be sent to

all members of the International Executive Board. The decision shall become the decision of the full International Executive Board unless, within ten (10) days, one or more members of the International Executive Board raises an objection to the decision, in which case the appeal shall be referred for decision to the International Executive Board at its next regular meeting. The International President shall promptly notify all parties concerned of the decision of the International Executive Board. The International Executive Board shall use its best efforts to render its decision within sixty (60) days of receipt of the appeal by the International President.

(e) CONVENTION APPEALS COMMITTEE. An appeal to the Convention Appeals

Committee shall be made in writing, signed by the member(s) and addressed to the Convention Appeals Committee in care of the International President.

JURISDICTION AND PROCEDURE. The Convention Appeals Committee has jurisdiction to consider and decide all appeals submitted to it from any decision or action of the International Executive Board or an International Trial Committee except in the types of cases set forth in Section 2(b) of this Article. The Convention Appeals Committee shall meet at least semi-annually, at the International Union Headquarters, to act on all appeals that have been submitted to it at least thirty (30) days prior to the date established for its meeting. The administrative procedures for

the Convention Appeals Committee in handling appeals shall be established by the International Executive Board, subject to review by subsequent Constitutional Conventions. All decisions of the Convention Appeals Committee shall be final and binding.

SELECTION OF CONVENTION APPEALS COMMITTEE. The Convention Appeals Committee shall consist of a member and a first and second alternate from each region to be selected by lot from the delegates from each region, when they elect their Regional Director. To provide continuity, members of the Convention Appeals Committee shall be selected from one-half of the regions at each Convention. Such members selected shall serve for two (2) Convention terms. In the event a vacancy occurs on the Convention Appeals

Committee, it shall be filled by the ranking alternate from that region. All remaining vacancies shall be filled by lot at the next regular Constitutional Convention.

(f) PUBLIC REVIEW BOARD. An appeal to the Public Review Board shall be made in writing, signed by the appellant, and addressed to the Public Review Board care of the International President.

JURISDICTION. In addition to the jurisdiction conferred elsewhere in this Constitution, the Public Review Board has jurisdiction to consider and decide appeals from any decision or action of the International Executive Board or an International Trial Committee.

Where the case arises under Article 10, Section 12; Article 12, Sections 2 and 3; Article 16, Section 7; Article 30;

Article 31; Article 36, Sections 9 and 10; Article 38, Sections 11 and 12; or Article 48, Sections 5 and 6;

Where the International Executive Board, pursuant to Article 12, Section 17, has reviewed the action or decision of its administrative arm, or where the International Executive Board has decided an appeal which concerns action or inaction relative to the processing of a grievance against an employer, subject, however, to the limitation of Section 4(i) of thisArticle; and

In any other case in which the International Executive Board has passed upon an appeal from the action of a Local Union, Amalgamated Local Union, or other

subordinate body, except in the relevant types of cases set forth in Section 2(a) and (b) of this Article.

DETERMINING JURISDICTION. In cases that involve the processing of grievances, the Public Review Board shall first determine whether the specific allegation upon which appellant claims the Public Review Board's jurisdiction to be based is or is not true. If the jurisdictional allegation is found to be false, it shall dismiss the appeal. If the appeal is thus dismissed, the appellant may, within thirty (30) days of notification of the dismissal, appeal the case in the Convention Appeals Committee, provided that in such an appeal, the appellant may not again raise any issue which the Public Review Board

resolved in dismissing for lack of jurisdiction.

LIMITATION. In no event shall the Public Review Board, under this or any other article, have jurisdiction to review in any way an official collective bargaining policy of the International Union.

PROCEDURES. If the appellant elects to appeal to the Public Review Board, the appeal shall be considered by the full Board, or a panel thereof. Where the Public Review Board has jurisdiction, the full Board or panel shall decide and dispose of all matters raised by the appeal. The Public Review Board, pursuant to Article 32, Section 6, shall establish its own rules of procedure including those governing the extent and scope of hearings.

When notified that an appeal to the Public Review Board has been filed, the International President shall forward to the Chairperson of the Public Review Board all documents and records in the case. After studying said documents and records, the Public Review Board, or a panel thereof, shall hold a hearing, unless it concludes that the appeal is unsubstantial or that no useful purpose would be served by a hearing; in which event the appeal may be decided or dismissed without a hearing.

The Public Review Board or panel thereof shall upon due consideration issue its decision, which shall be final and binding on all parties.

Section 4. GENERAL REQUIREMENTS. The following rules, unless otherwise indicated, shall govern all levels

of the foregoing appeal procedure.

(a) CONTENTS OF APPEAL. Any appeal should set forth the action or decision being appealed and should include all information available in support of the appeal. The appeal should be as specific and detailed as possible and must be signed by the member(s).

(b) CALCULATION OF TIME. The time limits of Section 4(c) of this Article begin to run from the time the appellant first becomes aware, or reasonably should have become aware, of the alleged action or decision appealed. In the case of an appeal from a decision of the International Executive Board, the time limit shall begin to run when the appellant first

receives notice of the decision. For purposes of this Article, "day" means a calendar day. If mailed, an appeal will be considered filed on the date it is post marked.

(c) TIME LIMITS FOR APPEAL. To be considered, an appeal must comply with these time limits, if no other time limit is specifically set forth in this Constitution: Appeal to Local Union -- sixty (60) days; Amalgamated Local Union -- Appeal to unit, sixty (60) days, appeal from unit to Amalgamated Local Union itself, thirty (30) days appeal to other subordinate body -- sixty (60) days; appeal to International Executive Board -- appellate or original cases, thirty (30) days;

appeal to Convention Appeals Committee -- thirty (30) days; appeal to Public Review Board -- thirty (30) days.

(d) EXTENSIONS OF TIME. In the case of an appeal to a Local Union, Amalgamated Local Union, or other subordinate body, or in the case of an appeal to the International Executive Board or Convention Appeals Committee, the International President may waive the time for filing the appeal if warranted by the circumstances.

(e) COMPLIANCE PENDING APPEAL. The decision of the lower tribunal, in all cases, must be complied with before an appeal can be accepted by the next tribunal in authority and shall remain

in effect until reversed or modified. The International President may, upon written application of an appellant, waive in whole or in part requirements of such compliance where unusual circumstances warrant it.

(f) COUNSEL. Any party to an appeal before the International Executive Board, Convention Appeals Committee or Public Review Board, shall be permitted representation by counsel or other representative of her/his choice. Unless otherwise specified in this Constitution, counsel are not permitted before a Local Union. Amalgamated Local Union, or other subordinate body, except as provided in Article 31,

Section 5. The party retaining counsel, or other representative, shall bear any cost of such representation.

(g) BRIEFS. Any party to an appeal may submit a brief or other written statement of position.

(h) HEARINGS. Hearings, when held, shall be such as, in the discretion of the tribunal, shall bring to light all the facts and issues involved. The appellant and appellee (or their representatives) shall be required to appear, with such witnesses as they may choose, and shall answer fully and truthfully all questions put to them. The parties shall be afforded full opportunity to present their respective positions on all

matters bearing on the action, decision or penalty under review. A hearing held by the International Executive Board, through its Appeals Committee or the International President, shall be held as close to the locality from which the appeal originates as possible in order to minimize the expense and inconvenience to the parties. A hearing before a panel or committee of a reviewing tribunal is deemed a hearing before the full reviewing tribunal.

(i) GRIEVANCE AND RELATED APPEALS. In any appeal to the Public Review Board, under Section 3(f) of this Article, concerning the handling of a grievance or other issue involving a collective

bargaining agreement, the Public Review Board shall not have jurisdiction unless the appellant has alleged before the International Executive Board that the matter was improperly handled because of fraud, discrimination or collusion with management, or that the disposition or handling of the matter was devoid of any rational basis.

Section 5. OBLIGATION TO EXHAUST INTERNAL UNION REMEDIES. It shall be the duty of any individual or body, if aggrieved by any action, decision or penalty imposed, to exhaust fully the individual or body's remedy and all appeals under this Constitution and the rules of this Union before going to a civil court or governmental agency for redress.

(3)

No. 90-684

Supreme Court, U.S.
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NOV 19 1990
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CLAWZELLE WIGGINS,

Petitioner,

v.

CHRYSLER CORPORATION; ACUSTAR, INC.; INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) AND ITS LOCAL 1435,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

RESPONDENT UAW'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Sixth Circuit properly found that Petitioner's failure to exhaust internal union remedies would not be excused?

2. Whether, in a § 301 action a District Court properly denies a stay to a plaintiff who has failed to exhaust internal union remedies and such remedies have been time-barred under the internal procedures?

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IN THE

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OCTOBER TERM, 1990

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

RESPONDENT UAW'S BRIEF IN OPPOSITION

PRAYER

The Respondents International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and its Local 1435 respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Sixth Circuit's decision in this case. The decision is unreported.

STATEMENT OF THE CASE

Respondents accept the facts as stated by the District Court and affirmed by the Sixth Circuit. Petitioner's Statement of the Case is incomplete and argumentative.

Petitioner was hired by Chrysler on October 9, 1967, at its Perryburg, Ohio plant and was continuously employed by Chrysler and/or Acustar until August 29, 1986. During this entire period of time the terms and conditions of petitioner's employment were governed by Collective Bargaining Agreements between Chrysler and/or Acustar and the UAW.

Petitioner exhibited a pattern of attendance problems and related disciplinary action beginning shortly after hire. From November of 1968 until October of 1983, petitioner accumulated thirteen (13) warnings, seven (7) one day disciplinary layoffs, seven (7) three day disciplinary layoffs and four (4) five day disciplinary layoffs for his absenteeism. In June of 1984, petitioner was counseled about his excessive absenteeism pursuant to the disciplinary system under the contractual Uniform Attendance Procedure. In July of 1985 petitioner was counseled again under the same procedure.

Petitioner's continued absenteeism led to implementation of the Chronic Absentee Procedure. This procedure applied to "employees who avoid corrective discipline for absences by attributing them to frequent and recurring illnesses" whose "irregular attendance prevents them from fulfilling the purpose for which they were hired, that is, as full-time employees." Pursuant to this procedure petitioner was counseled on August 20, 1985 because his absentee rate was 23.9% for the six month period from December 31, 1984 through June 30, 1985, and warned that if his attendance did not improve significantly, he would be counseled again, disciplined or terminated. Petitioner objected to his inclusion in the Chronic Absentee Procedure, claiming that certain periods of absence should not be counted in the computation of his absentee rate and appealed to the contractually established Chrysler-UAW National Attendance Council to review his records to determine if any periods of absence could be excluded from computation of the

rate. In May of 1986, the National Attendance Council issued its decision finding that the disputed absences were to be included and, as such, that petitioner was properly placed in the Chronic Absentee Procedure. In August of 1986, petitioner's attendance was again evaluated for the six month period ending May 31, 1986 wherein it was determined that his rate of absenteeism had risen to 46.7%. Petitioner was discharged for this absenteeism on August 29, 1986.

UAW Local 1435 filed a grievance protesting petitioner's discharge seeking reinstatement without loss of seniority or pay. This grievance was processed through the National Attendance Council step of the grievance procedure. On April 1, 1988 the National Attendance Council issued its decision on the grievance offering petitioner reinstatement in accordance with his seniority but without back pay.[1] Petitioner refused reinstatement and, without once attempting the available internal union remedies, filed this suit on May 25, 1988.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. THE SIXTH CIRCUIT PROPERLY FOUND, ON THE UNDISPUTED FACTS BEFORE IT, THAT PETITIONER'S FAILURE TO EXHAUST INTERNAL UNION REMEDIES WOULD NOT BE EXCUSED

In *Clayton v. Automobile Workers*, 451 U.S. 679 (1981), this Court held that courts have discretion whether to require exhaustion of internal union remedies and outlined three factors relevant to the exercise of that discretion—whether union officials are so hostile to the employee that a fair hearing could not be obtained; whether the internal procedure would be inadequate either to reactivate the employee's grievance or to award

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[3] Petitioner's statement that the National Attendance Council's decision would exclude the period of August 1986 to April 1988 from petitioner's seniority (Petition at p. 10) is simply wrong.

him the full relief he seeks under § 301; and whether exhaustion of internal procedures would unreasonably delay the opportunity to obtain a judicial hearing. In the present case the District Court followed *Clayton* and properly exercised its discretion in determining that petitioner was required to exhaust internal union remedies. The Sixth Circuit correctly affirmed that determination.

Both Courts below reviewed each and every reason proffered by petitioner to excuse his failure to exhaust internal union remedies. The relevant facts were undisputed. Petitioner was a recipient of the UAW publication *Solidarity*. The record contained many articles from *Solidarity* which outlined the internal appeals procedure in a clear and understandable manner. Additionally, petitioner had retained counsel either at the time he was informed of the offer for reinstatement or within a month thereafter. Counsel should be charged with the responsibility of ascertaining what internal remedies exist and with the knowledge that exhaustion of those internal remedies would be mandatory. Based on these undisputed facts, the Courts below properly rejected petitioner's proffered excuse of ignorance.

Contrary to petitioner's contention, the opinions below in no way conflict with the Second Circuit's holding in *Johnson v. General Motors*, 641 F.2d 1075 (2nd. Cir. 1981) (Initially, of course it must be noted that *Johnson* is pre-*Clayton* and its continued validity even within the Second Circuit is suspect, especially in light of cases such as *Wozniak v. Auto Workers Local 2266*, 842 F.2d 635 (2nd. Cir. 1988)). *Johnson* is fact specific and the facts before the *Johnson* Court are different from the facts in the present case. For example, *Johnson* dealt with the 1977 version of the UAW Constitution which is substantially different from the 1986 Constitution applicable to the present case; *Johnson* did not involve *any* evidence of *Solidarity* issues outlining the internal procedures and *Johnson* did not involve an attorney for the grievant

retained at an early stage as does this case. This Court has consistently refused to grant certiorari to review evidence and discuss specific facts. *Texas v. Mead*, 465 U.S. 1041 (1984); *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 177 n.8 (1981); *United States v. Johnson*, 268 U.S. 220 (1925).

Petitioner merely disagrees with the decisions below and his disagreement does not give rise to any issue worthy of review.

II. IN A § 301 ACTION A DISTRICT COURT PROPERLY DENIES A STAY TO A PLAINTIFF WHO HAS FAILED TO EXHAUST INTERNAL UNION REMEDIES AND SUCH REMEDIES HAVE BEEN TIME-BARRED UNDER THE INTERNAL PROCEDURES

Petitioner correctly notes that there is no legal precedent to support his contention that a stay should be granted to allow union members an opportunity to pursue internal union remedies. Any stay order is directed to the sound discretion of the Court stemming from the Court's inherent power to control its own docket. See e.g. *Ohio Environmental Council v. U.S. District Court*, 565 F.2d 393 (6th Cir. 1977). Here, even if the District Court did stay the procedure, it would be to no avail because the time limit for filing an internal union appeal had long since passed. Further, granting a stay would totally undermine *Clayton* and its progeny. *Clayton* specifically rejected an analogy to the Landrum-Griffin Act and the policy of forestalling judicial interference with internal union affairs finding that instead the national labor policy encouraging private rather than judicial resolution of disputes over collective bargaining agreements was applicable to § 301 suits. That national policy would not be served by allowing petitioner to litigate his dispute in court for nearly a year before seeking a stay to allow instituting the union internal appeals which were available at the outset.

CONCLUSION

It is clear from the Petition that petitioner is merely asking this Court to re-evaluate all the evidence that was fairly and fully evaluated by the Courts below. The decision of the Sixth Circuit was correctly rendered in accordance with well settled principles of law. Petitioner raises no issue worthy of this Court's precious time. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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(4)

No. 90-684

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IN THE

Supreme Court of the United States

October Term, 1990

CLAWZELLE WIGGINS,
Petitioner,

vs.

CHRYSLER CORPORATION; ACUSTAR, INC.; INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) AND ITS LOCAL 1435,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS CHRYSLER CORPORATION AND ACUSTAR, INC.

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Sixth Circuit properly found that Petitioner's failure to exhaust internal union remedies would not be excused?

2. Whether the District Court properly denied Petitioner's request for a stay when the internal union remedies Petitioner sought to exhaust during the pendency of the stay were already time-barred?

3. Whether the Sixth Circuit properly found that Petitioner failed to establish a *prima facie* case of race discrimination under Title VII of the Civil Rights Act of 1964 where Petitioner failed to introduce evidence of dissimilarly treated white employees?

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No. 90-684

IN THE

Supreme Court of the United States

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CLAWZELLE WIGGINS,
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vs.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS CHRYSLER CORPORATION AND ACUSTAR, INC.

PRAYER

The Respondents Chrysler Corporation and Acustar, Inc. respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Sixth Circuit's decision in this case. The decision is unreported.

STATEMENT OF THE CASE

Respondents accept the facts as stated by the District Court, adopted by the Sixth Circuit and summarized in the UAW's Brief in Opposition.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. THE SIXTH CIRCUIT PROPERLY FOUND, ON THE UNDISPUTED FACTS BEFORE IT, THAT PETITIONER'S FAILURE TO EXHAUST INTERNAL UNION REMEDIES WOULD NOT BE EXCUSED.

Respondents adopt as if fully rewritten herein the argument contained on pages 3-5 of Respondent UAW's Brief in Opposition as it pertains to Petitioner's failure to exhaust internal union remedies.

II. THE DISTRICT COURT PROPERLY DENIED PETITIONER'S REQUEST FOR A STAY BECAUSE THE INTERNAL UNION REMEDIES PETITIONER SOUGHT TO EXHAUST DURING THE PENDENCY OF THE STAY WERE ALREADY TIME-BARRED.

Respondents adopt as if fully rewritten herein the argument contained on page 5 of Respondent UAW's Brief in Opposition as it pertains to the District Court's denial of a stay.

III. THE SIXTH CIRCUIT PROPERLY FOUND THAT PETITIONER FAILED TO ESTABLISH A *PRIMA FACIE* CASE OF RACE DISCRIMINATION UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 BECAUSE PETITIONER FAILED TO INTRODUCE EVIDENCE OF DISSIMILARLY TREATED WHITE EMPLOYEES.

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), this Court described an employee's basic burden of proof in a Title VII case alleging discriminatory treatment, stating:

> "The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination."

McDonnell Douglas Corp. v. Green, 411 U.S. at 802. Petitioner argued at trial that similarly situated white employees of Respondent with attendance records worse or as bad as his were not discharged. The District Court properly found that Petitioner failed to establish a *prima facie* case because the evidence failed to show that those employees to whom Petitioner compared himself were either (1) similarly situated, or (2) white.

Petitioner urges a review of the District Court and Court of Appeals opinions on the basis that "two whites with worse or comparable records were treated more leniently and were not discharged." The lower courts' examination of the record, however, revealed that:

> "Plaintiff has produced no evidence as to the race of these two employees . . . [and] . . . it does not appear from their attendance records that they were treated differently than the plaintiff."

Opinion and order, appendix page 19.

CONCLUSION

Petitioner identifies no issue of legal conflict or undecided important question of federal law. Instead, the petition seeks re-evaluation of evidence clearly and fully considered by the District Court and reviewed and reheard by the Sixth Circuit Court of Appeals. Because Petitioner seeks only the re-examination of evidence evaluated in accordance with unchallenged legal standards, the petition for writ of certiorari should be denied.

Respectfully submitted,

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